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In The

Supreme Court of the United States

October Term, 1970

No. 126 3

THE NEW YORK STOCK EXCHANGE,
Petitioner,

against

THE SECURITIES CORPORATION, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

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October Term, 1970

No. .....

The New York Stock Exchange,
Petitioner,

against

Thill Securities Corporation, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the New York Stock Exchange (the "Exchange"), respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit entered in this action on August 27, 1970.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, reported at 432 F.2d 284, appear in the Appendix hereto at p. 6. The opinion of the District Court, not officially reported, appears in the Appendix hereto at p. 35.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 27, 1970. A timely petition

for rehearing en banc was denied on November 18, 1970, and this petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented in this case—which was expressly noted but left undecided by this Court in its only opinion dealing with the effect of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq.*) on the applicability of the antitrust laws to stock exchanges, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 358, n. 12, 360 (1963)—is as follows:

> Whether Exchange rules—in this case a rule prohibiting members from rebating commissions to nonmembers—which are adopted by the Exchange in good faith to effectuate its duty of self-regulation under the Exchange Act and which, under that Act, are expressly made subject to review and revision "through a vehicle other than the antitrust laws," *i.e.*, the Securities and Exchange Commission (see 373 U.S. at p. 360), are nevertheless not exempt from the antitrust laws unless the Exchange proves to the satisfaction of an antitrust court that such rules are necessary to make the Exchange Act work.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, which appear in full text in the Appendix hereto at p. 1, are Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 6 and 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. §§ 78f and 78(b)). The case also involves Art. XV, Sec. 1 of the constitution of the Exchange which appears in the Appendix hereto at p. 4.

STATEMENT OF THE CASE

A. Nature of Case, Courses of Proceedings and Disposition Below.

Respondent, Thill Securities Corporation ("Thill"), a former securities broker-dealer, not a member of the Exchange, commenced this action in the United States District Court for the Eastern District of Wisconsin on October 18, 1963, allegedly on behalf of itself and more than 4,000 other nonmember broker-dealers throughout the United States. (J.A. 4-5)[1] Federal jurisdiction was invoked under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). (J.A. 4)

The complaint charged that the provision of the Exchange's constitution which prohibits members from sharing with nonmembers the minimum commissions which the constitution requires members to charge nonmembers on transactions in securities listed on the Exchange constitutes a restraint of trade in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). (J.A. 8-9) The complaint sought declaratory and injunctive relief and treble damages of $21 million. (J.A. 10-11)

After answer (J.A. 12), the Exchange moved for summary judgment. (J.A. 15) On August 26, 1969, the District Court granted the motion and entered judgment dismissing the action. (J.A. 142) The District Court held that the Sherman Act does not apply to the Exchange's rule against rebating of commissions by reason of Section 19(b) of the Exchange Act authorizing the Exchange to adopt rules in respect of the fixing of rates of commission, subject to review and revision by the Securities and Exchange Commission ("the SEC"); and because the SEC has and is exercising exclusive review jurisdiction over the Exchange's rule. (App. 25)

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[1] The joint appendix as printed for the use of the Court below is hereinafter referred to as "J.A." The appendix to this petition is hereinafter referred to as "App."

Thill appealed, and on August 27, 1970, the Court of Appeals for the Seventh Circuit (writing three separate opinions) reversed the judgment of the District Court (with one judge dissenting in part) and remanded the case to that Court for "full proceedings consistent with the conclusions" expressed in the opinion of District Judge Campbell, sitting by designation. (App. 6)

In their opinions, Judge Campbell and Chief Circuit Judge Swygert held, in substance, that even though the Exchange's rule against the sharing of commissions came within the self-regulatory power conferred upon the Exchange by Section 19(b) of the Exchange Act and was subject to the SEC's power of review and revision under the Act the rule is vulnerable to antitrust attack and may be upheld only if the Exchange justifies the rule by proving that the rule was "necessary for the operation of the Securities [Exchange] Act." (App. 13-14, 22, 27-28). Judge Pell dissented from this conclusion, holding that since the adoption of the anti-rebate rule was within the self-regulatory authority of the Exchange under Section 19(b) of the Exchange Act and since "the very matter under consideration is now under consideration by the SEC" in the exercise of its supervisory jurisdiction, it is inappropriate for an anti-trust court to attempt to determine the reasonableness of the anti-rebate rule. (App. 30-31)

The Exchange filed a timely petition for rehearing, and an order denying said petition, one judge dissenting, was entered on November 18, 1970. (App. 34)

B. The Facts.

The material facts (none of which was controverted) are as follows.

For nearly 180 years the Exchange has had a rule prescribing minimum rates of commission to be charged by its members and member organizations to nonmembers, includ-

ing nonmember brokers and dealers, on transactions in securities listed on the Exchange. (J.A. 16) As a corollary, the same rule (Article XV, Sec. 1 of the Exchange's constitution) prohibits the rebating or sharing of commissions with nonmembers. (App. 4)

After enactment of the Exchange Act the Exchange applied to the SEC for registration as a national securities exchange and filed, as required (15 U.S.C. § 78f(a)), copies of its constitution and rules, including the provisions prescribing minimum rates of commission and prohibiting rebates to nonmembers. (J.A. 19-20) In its order approving the Exchange's application the SEC expressly found that the Exchange's constitution and rules were "just and adequate to insure fair dealing and to protect investors." (J.A. 28-29)

During the ensuing period of nearly 30 years prior to the commencement of this action the SEC on numerous occasions reviewed the Exchange's commission rule, and, while approving or disapproving proposed changes in commission level and structure, the SEC at no time requested any change in that aspect of the commission structure which prohibits the sharing of commissions with nonmembers. (J.A. 22-23) However, in its 1963 *Report of the Special Study of Securities Markets* made to Congress, the SEC, after noting that "all nonmembers, whether or not professionals in the securities business, pay the same public commission rate" with respect to transactions on the Exchange, recommended that:

> "The advantages and disadvantages of associate memberships and/or special nonmember commission rates, from the viewpoint of the NYSE and its members and of the public interest, should be a subject of joint Commission-Exchange study, particularly with reference to problems of competition, depth of markets, and reciprocity." (88th Cong., 1st Sess., House Doc. No. 95, Pt. 5, p. 106)

On May 28, 1968, noting that the commission rate structure of national securities exchanges had been "the subject of extensive and continuing study" by it (J.A. 53), the SEC issued an order instituting an investigation and a public hearing to consider whether any changes should be made in the rules, policies, practices, and procedures of registered national securities exchanges "respecting commission rate structure." (J.A. 23, 48-51, 53) The SEC stated that the investigation and hearing were intended to assist it "in the discharge of its responsibilities under Section 19(b) of the Exchange Act" and listed "economic access to exchange markets by nonmember broker-dealers" (*i.e.*, some form of reduced commission rates) as one of the matters relating to exchange commission rate structure to be included in its inquiry. (J.A. 23, 50-52)

The investigation ordered by the SEC began with a public hearing on July 1, 1968, was pending throughout the consideration of the appeal in this action, and is still in progress. (J.A. 80) On October 22, 1970, the SEC requested petitioner to present for the SEC's consideration on or before June 30, 1971, *inter alia:*

> "* * * a plan for reasonable economic access to the New York Stock Exchange for non-member broker-dealers." (SEC Exchange Act Release No. 9007)

REASONS FOR GRANTING THE WRIT

I.

There is an urgent need for this Court to resolve the important question of the applicability of the antitrust laws to exchange self-regulation which is subject to SEC oversight, a question expressly left undecided by this Court in the *Silver* case.

A. The Public Importance of the Question.

The issue presented in this case is of major public importance, involving the complex matter of reconciliation of

the Sherman Act with the plan of regulation embodied in the Exchange Act.

This Court has specifically recognized the vital role which securities exchanges play in the economic life of the nation:

> "Stock exchanges perform an important function in the economic life of this country. They serve, first of all, as an indispensable mechanism through which corporate securities can be bought and sold. To corporate enterprise such a market mechanism is a fundamental element in facilitating the successful marshaling of large aggregations of funds that would otherwise be extremely difficult of access. To the public the exchanges are an investment channel which promises ready convertibility of stock holdings into cash." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 349 (1963).

Furthermore, this Court has acknowledged that reconciliation of the regulatory scheme of the Exchange Act with the antitrust laws presents novel and difficult problems of national importance. Thus, in *Silver, supra*, this issue was characterized as "of great importance to the public and financial community" (373 U.S. at 342), words which were echoed by the former Chief Justice in his opinion dissenting from the denial of certiorari in *Kaplan* v. *Lehman Bros.* (389 U.S. at 954):

> "This is no ordinary case. It is of utmost importance to millions of investors, and concerns practices which have an impact on the entire economy of the Nation."

It was this obvious public importance of securities exchanges and the need to prevent abuses in their administration that gave birth to statutory regulation in the form of the Exchange Act. In Section 2 of the Act Congress expressly declared that transactions on securities exchanges

were affected "with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective . . ." (15 U.S.C. § 78b)

Congress did not choose, however, to displace the exchanges' traditional process of self-regulation, but decided rather to delegate regulatory responsibility to the exchanges themselves subject to continuing governmental oversight, which, as this Court described it in *Silver*, consists of a "type of partnership between government and private enterprise." (373 U.S. at p. 366) Thus Section 6 of the Exchange Act provides for registration of securities exchanges with the SEC, and provides that before granting registration to an exchange the SEC must find, among other things, that such exchange's rules "are just and adequate to insure fair dealing and to protect investors." (15 U.S.C. § 78f).

Section 19 of the Exchange Act vests the SEC with broad supervisory and regulatory powers over registered securities exchanges. (15 U.S.C. § 78s) Section 19(b) of the Act authorizes the Commission by "rules or regulations or by order to alter or supplement the rules" of an exchange if the SEC determines that "such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." (15 U.S.C. § 78s(b)) The Exchange rules which the SEC is thus authorized to alter or supplement include those relating to ". . . the fixing of reasonable rates of commission, interest, listing, and other charges . . ." (Section 19(b)(9), 15 U.S.C. § 78s(b)(9))

These provisions of the Exchange Act make it plain that while broad supervisory and residual powers and ultimate

regulatory jurisdiction over the areas enumerated in Section 19(b) rest with the SEC, Congress imposed directly on the exchanges themselves the duty to take the regulatory initiative in enacting rules.

B. The Question Left Open by this Court in *Silver*.

In the *Silver* case, this Court recognized that the Exchange Act imposed upon the Exchange a "federally mandated duty" of self-regulation involving initiative and responsibility on the part of the Exchange to promulgate rules and noted that the "general dimensions" of such self-regulatory duty are suggested by Section 19(b) of the Act. (373 at pp. 352-353) The Court pointed out, however, that although Section 19(b) gives the SEC power to request the Exchange to change its rules and to disapprove rules adopted by the Exchange pursuant to its self-regulatory duty, the Act gives the SEC no jurisdiction to "review particular instances of enforcement of exchange rules." (373 U.S. at p. 357) Since the Exchange conduct challenged in the *Silver* case—instructions to the Exchange's members to discontinue private wire connections to Silver—was found to be such a particular instance of enforcement of exchange rules over which the SEC had no review power, implied repeal of the Sherman Act was not deemed necessary because application of the antitrust laws would not conflict with the regulatory scheme and purposes of the Act. As the Court put it:

> "• • • the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power. . . ." (373 U.S. at p. 356)

This Court then carefully contrasted the situation where the SEC had supervisory jurisdiction over the Exchange

activity in question—the situation presented in this case but not present in *Silver*—and stated that such a situation would present "a different case" as to antitrust immunity.

> "Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association (i.e., by the NASD), §§ 15A(g), 15A(h), 25(a), 15 U.S.C. §§ 78o-3(g), 78o-3(h), 78y(a); see *R. H. Johnson & Co.* v. *Securities & Exchange Comm'n*, 198 F.2d 690 (C.A. 2d Cir. 1952), cert. denied, 344 U.S. 855, a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at p. 358, fn. 12)

Reverting to the same theme later in its opinion, the Court said:

> "... Should review of exchange self-regulation be provided by a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." (373 U.S. at p. 360)

Thus, while recognizing the importance of exchange self-regulation and the need for exchanges to have guidance as to what regulatory action would be protected from antitrust attack, this Court nevertheless expressly left open the question as to the extent of antitrust protection afforded by the existence of SEC oversight, a question not there before it.

C. The Resolution by the Court Below of the Question Left Open in *Silver* Jeopardizes Regulation Both by Exchanges and by the SEC.

The decision of the Court of Appeals in this case will frustrate the operation of the delicate self-regulatory mechanism of securities exchanges established by Congress more than 36 years ago in the Exchange Act by opening up to

attack in antitrust courts activities of exchanges carried on pursuant to their duty of self-regulation, subject to direct supervisory jurisdiction of the SEC. Under pain of antitrust treble damage liability which might threaten the very existence of some exchanges, the decision holds that if an exchange adopts a rule, it is required to justify such rule to an antitrust court even though the rule is subject to review and revisory jurisdiction of the SEC and despite the fact that the SEC has the particular rule under active investigation. (App. 18-22, 27-33)

Thus, the decision threatens to deprive the public of the benefits of exchange self-regulation. In marked contrast to other regulatory statutes which provide for direct regulation by federal agencies, here the only type of direct regulation which Congress has mandated is self-regulation, the SEC's role being a residual one of review and revision of exchange rules. An exchange cannot be expected to take the risk of adopting regulatory measures which an antitrust court might later determine not to be necessary to "make the Exchange Act work," thus exposing the exchange to liability for potentially staggering amounts. This was recognized by Justices Harlan and Stewart in the dissenting opinion in the *Silver* case (373 U.S. at 371): "This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties."

The decision below also paves the way for repeated conflicts between the federal courts and the SEC which would seriously impair the ability of the SEC, as an independent government agency, to carry out its statutory duties under the Exchange Act. In its *Special Study* the SEC expressed the following views concerning the effective functioning of the self-regulatory scheme of the Act:

> "If self-regulation is to function effectively and with due regard for *all* aspects of the public interest, includ-

> ing the interest in vigorous self-regulation, the forum for review of self-regulatory action should be the agency already established as the official, expert guardian of the public interest in the field of securities; i.e., the Commission. With its broad responsibility and concern for the entire area, it is in the best position to comprehend and reconcile—in the first instance and subject to judicial and congressional oversight of its own activities—the diverse factors and considerations that may constitute or bear upon the total public interest in the manifold and complex circumstances where the question may arise. *This is true of questions of competition and all other aspects of the public interest*, as well as questions of reconcilement of private interests." (88 Pt. 4, p. 707). (Emphasis supplied)

In comparable situations this Court has recognized the impropriety of judicial intervention in the delicate complexities involved in rate making in regulated industries. In *United States* v. *R.C.A.*, 358 U.S. 334 (1959), the Court said that:

> "... sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance." 358 U.S. at 348.

Again, in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942), the Court said:

> "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure, only a minor phase of which is caught in the record before us." (314 U.S. at 548)

See also, *Arrow Transportation Company* v. *Southern Railway*, 372 U.S. 658, 669-70 (1963)

And as Mr. Justice Black so aptly put it in another context in his recent dissent in *Rosado* v. *Wyman*, 397 U.S. 397 (1970):

> "But more fundamentally, I think it will be impossible for HEW to fulfill its function under the Social Security Act if its proceedings can be disrupted and its authority undercut by courts which rush to make precisely the same determination that the agency is directed by the Act to make. . . . In the long run, then, judicial pre-emption of the agency's rightful responsibility can only lead to the collapse of the enforcement scheme envisioned by Congress, and I fear that this once and others have carried such a process well along its way." 397 U.S. at 434-435

B. The Exchange's Dilemma: The Risk of Antitrust Liability for Regulation Versus the Risk of Exchange Act Liability for Non-Regulation.

The threat of antitrust treble damage liability posed by the decision below confronts the Exchange and all other registered national securities exchanges with a dilemma of alarming proportions.

On the one hand, Sections 6 and 19(b) of the Exchange Act obligate the Exchange in the exercise of its self-regulatory duty to adopt and to enforce rules governing the administration of its affairs and the conduct of its members. At the same time it has been held that failure to do so may result in liability of the Exchange to a member of the public injured by the lack of such self-regulation. See *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir. 1944), *cert. denied* 323 U.S. 737 (1944); *Pettit* v. *American Stock Exchange*, 217 F. Supp. 21 (S.D. N.Y. 1963). Cf., *Butterman* v. *Walston*, 387 F.2d 822 (7th Cir. 1967); *cert. denied* 391 U.S. 913 (1968). On the other hand, if the Exchange does carry out its responsibility as a self-regulatory body the Exchange and its members may be subject to an antitrust suit by a

person affected by an exchange rule and to unknown "perils of treble damage liability, retroactively imposed, upon the variant decisions of different courts . . ." See *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562, 566 (N.D. Ill. 1966).

This dilemma is dramatically reflected in two actions brought against the Exchange in connection with the debacle of Ira Haupt & Company ("the salad oil scandal"), in which the same plaintiffs in one action charged the Exchange with liability for failure to discharge its Exchange Act duties by not suspending the Haupt firm earlier and, in another action, charged the Exchange with antitrust liability for consequences of the actions taken in suspending the firm. See *Klebanow* v. *New York Stock Exchange*, U.S. District Court, Southern District of New York, Civil Action No. 64-692 and *Klebanow* v. *Funston*, U.S. District Court, Southern District of New York, Civil Action No. 64-935.

Unless this Court resolves this dilemma and provides the lower federal courts and the Exchange with clearly defined principles for reconciliation of the two statutes which balance the public interest in competition against the public interest in effective self-regulation of an industry which is "affected with a national public interest" (15 U.S.C. § 78b), the Exchange will be put in the incongruous position of being subject to liability under the Exchange Act if it does not regulate, and to liability under the antitrust laws if it does regulate.

In this connection the standards set forth in Section 19(b) of the Exchange Act—the protection of investors, the insurance of fair dealing in securities traded upon an exchange and the insurance of fair administration of an exchange—are sufficiently broad to allow the SEC to make the necessary reconciliation between the regulatory scheme of the Exchange Act and the policies of the antitrust laws. In fact the SEC has done so in a Section 19(b) proceeding involving a rule of the Exchange. See *The Rules of the New York Stock Exchange*, 10 S.E.C. 270, 286-287 (1941).

II.

The decision below conflicts with the rationale adopted by this Court in *Silver*.

The principal teachings of *Silver* are: (1) national securities exchanges may adopt rules regulating the relations of their members with nonmembers pursuant to the federally mandated duty of self-regulation imposed on them by the Exchange Act; (2) where rules of an exchange are attacked as being violative of the antitrust laws the issue is the extent to which the duty of exchange self-regulation contemplated by the Exchange Act is incompatible with the maintenance of an antitrust action and "repeal" of the antitrust laws will be implied whenever "necessary to make the Exchange Act work"; and (3) where the SEC lacks supervisory jurisdiction over the challenged exchange conduct such repeal is not necessary because there is no "problem of conflict or coextensiveness of coverage with the agency's regulatory power." (373 U.S. 357-358)

Thus, the *Silver* test for implied repeal of the antitrust laws as to an Exchange rule subject to SEC review power is not whether the *rule* itself is "necessary to make the Exchange Act work", but whether *repeal* is necessary to permit the carrying out of the regulatory scheme established by Congress through enactment of the Act.

Completely misreading this Court's opinion, the Court of Appeals held that *Silver* stands for the proposition that in every case in which an Exchange rule is challenged—regardless of whether there is SEC review—the Exchange has the burden of proving that the rule comports with the Exchange Act before it is relieved from antitrust liability. (App. 14, 18-22) Thus, Judge Swygert in his concurring opinion held that SEC jurisdiction to review exchange self-regulatory activities under Section 19(b) was "irrelevant to the scope of exchange exemption from the antitrust laws" (App. 28), and similar views with respect to the

teaching of the *Silver* case were expressed by District Judge Campbell (App. 14). The Court below thus ignored not only the fact that the "necessary to make the Act work" test in *Silver* was enunciated as a test for repeal, and not for determining the validity of a rule, but also ignored the express, twice repeated, admonition of this Court in *Silver* that where SEC review jurisdiction exists "a different case . . . [arises] concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at p. 358, n. 12)

The decisions in *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (D.C.N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir. 1967), *cert. denied*, 389 U.S. 954 (1967), on the other hand, reflect a logical application of this Court's rationale in *Silver* to an antitrust attack on the Exchange's rule fixing minimum commissions. In *Kaplan*, the District Court held *Silver* to be "a complete bar" to the antitrust claim (250 F. Supp. at p. 565) on the ground that since the fixing of commissions was within the scope of the Exchange's duty of self-regulation under Section 19(b) of the Exchange Act and was subject to review and revision by the SEC, the Sherman Act was inapplicable. Quoting from *Silver*, the Court stated:

> " 'Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.' (373 U.S. at 360, 83 S.Ct., at 1258). This is the 'different case', since the SEC exercises a general and continuing power to change, alter, or supplement the rules of the Exchange fixing the rates of commission. Since review is afforded within the system of securities regulation, there is no need to resort to the antitrust laws for a remedy." (250 F. Supp. at p. 566)

The Court of Appeals for the Seventh Circuit (through a different panel from that which decided this case) affirmed, agreeing that *Silver* dictated a holding that the antitrust laws did not apply to the Exchange's rule pre-

scribing minimum commissions. It refused to construe the Sherman Act and the Exchange Act "as showing a congressional intention to permit the maintenance of an antitrust prosecution of the exchange or its members to be based upon its action relating to rates of commission to be charged by its members." (371 F.2d at 411). This Court denied certiorari. 389 U.S. 954 (1967).

The *Kaplan* courts' interpretation of *Silver* is correct. In "obligating [the exchanges] to regulate themselves" (*Silver*, 373 U.S. at p. 356), Congress clearly conferred discretionary authority on exchanges and gave the SEC the power to require the Exchange to change its rules at any time, which, in the case of the anti-rebate rule, it has not done. Under such circumstances "the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action." (373 U.S. at p. 358)

III.

Exceptional reasons make it appropriate for this Court to review the decision below at the present stage of the proceeding.

There are important reasons which should lead this Court to review the decision below now:

1. If the judgment of the Court of Appeals is permitted to stand the case will be remanded to the District Court for full proceedings directed toward a determination whether the Exchange's anti-rebate rule is necessary to make the Exchange Act work. These proceedings would take place during the present pendency of the SEC's investigation into the same rule and would intrude upon the conduct of that investigation, in which the SEC has directed the Exchange to present, by June 30, 1971, "a plan for reasonable economic access to the New York Stock Exchange for non-member broker-dealers." Moreover, the Court and the SEC might reach different results, which would leave the

Exchange in the impossible position of having to select, at its peril, the determination by which to abide.

2. The Court's decision in *Silver* has spawned a number of private treble damage antitrust cases (but no government cases) against the Exchange, of which many are still pending unresolved in the lower courts. The damages sought in those cases where an amount is specified are in the millions and in one case the plaintiff seeks an award of $3 billion. Thus this case presents a troublesome question of great financial magnitude involved in numerous pending cases. An early and definitive ruling by this Court is desirable in order to assure uniformity of decisions in the lower courts.

3. The question of antitrust immunity is a clear-cut issue which is fundmental to the further conduct of this case. If the Exchange is to be required to prove that its anti-rebate rule is necessary to make the Exchange Act work the parties will be obliged to engage in a protracted and costly trial followed by a further appeal to the Court of Appeals and undoubtedly by a further application to this Court for certiorari. It is of great importance to the parties that this basic issue be determined now at this stage in the litigation.

4. Were the Court to defer review until after a final judgment there is a very real possibility that during the interim the public would be deprived of the benefits of the effective regulation mandated by Congress since the threat of treble damage liability would undoubtedly inhibit Exchange self-regulatory activity (see pp. 10-11 above) and would, in any event, frustrate the exercise by the SEC of its statutory supervisory responsibilities, particularly in its present investigation (see pp. 11-13 above).

For these exceptional reasons the Court should review the decision below at the present stage of the litigation. See *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3 (1949).

CONCLUSION

The decision below places the exchanges of this country at the crossroads between uniform regulation of the securities industry by expert bodies under the Exchange Act and *ad hoc* regulation by the variant decisions of courts under the antitrust laws.

The unusual national significance of the issues involved in this case, the impact of the decision below upon the nation's securities exchanges, and the serious disruption which the decision bodes to exert upon the effective working of the regulatory scheme of the Exchange Act call for immediate review by this Court of the important question which it left undecided in the *Silver* case.

Respectfully submitted,

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January 22, 1971

APPENDIX

Statutory Provisions Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *."

Section 2 of the Sherman Act, 15 U.S.C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f:

"(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

"(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

"(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regu-

lations require as being necessary or appropriate in the public interest or for the protection of investors;

"(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the 'rules of the exchange'; and

"(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

"(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

"(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

"(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

"(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration."

Section 19(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b):

"(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision

against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries, and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

Extract from Constitution of the New York Stock Exchange*

ARTICLE XV

Commissions and Service Charges

Obligation To Charge or Collect Commissions

Section 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than rates in this Article

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* This extract also appears at J.A. 33 and in note 1 to the District Court's opinion at A-35, *infra*.

prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed, directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18036

THILL SECURITIES CORPORATION, etc.,
Plaintiff-Appellant,

vs.

THE NEW YORK STOCK EXCHANGE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

AUGUST 27, 1970

Before SWYGERT, *Chief Circuit Judge*, PELL, *Circuit Judge* and CAMPBELL, *Senior District Judge*.*

CAMPBELL, *District Judge*. The basic question presented here is whether stock-brokers who are members of the New York Stock Exchange should continue to enjoy their self-acquired freedom from competition by stock-brokers who are not members. Using the vehicle of Stock Exchange rules, members seem effectively to have negated the congressionally mandated principle of competition as it would otherwise apply to them.

The New York Stock Exchange ("Exchange") is the largest organized securities market in the United States. Its dominance of the securities industry is a well known

* Judge Campbell of the United States District Court for the Northern District of Illinois is sitting by designation.

and commonly accepted commercial and historical fact. It transacts well over 70 per-cent of the dollar value of all stock transactions on exchanges in the United States. See, New York Stock Exchange, 1970 Fact Book. Its policies and practices have an ever increasing effect on our economy.

By the Exchange's Constitution, its membership is limited to 1366 members. In 1969 a membership sold for the record price of $515,000. Id. at 55.

The Exchange is governed by a 33 man Board, consisting of 29 members elected by the membership and a president and 3 governors who are to represent the public view and who are elected by the Board. The economic power of the Exchange and its members extends well beyond the operations of the Exchange itself. As the author of a leading article explains:

> "The influence wielded by these Big Board members, along with their 'allied' brethren, reaches way beyond the NYSE; thus they comprise 23 of the 32 Governors of the American Exchange; 16 of 25 of the Midwest Exchange's Governors; 8 out of 11 for the Pacific Exchange; and 16 of the 22-man Board of the National Association of Securities Dealers, a 'self-regulatory institution for the over-the-counter markets' to which, since it bars any of its members 'from dealing with a non-member broker or dealer except at the prices . . . accorded to members of the public', for 'all practical purposes the vast majority of brokers or dealers' must belong 'in order to engage profitably in most underwritings and over-the-counter business'. Quite understandably, then, it is on the operations of the NYSE and its members that antitrust interest has so far principally focused." Bicks, Antitrust And The New York Stock Exchange 21 Bus. Lawy. 129, 134 (1965)

In many respects the Exchange has been delegated governmental authority. Its counsel describes it as a "unique self regulator." Under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) it may adopt its own constitution and rules, and discipline violations thereof. The Securities Exchange Commission ("SEC") has the power, however, to order changes in Exchange rules respecting a number of subjects, set forth in section 19(b) of the Act.[1] 15 U.S.C. § 78s(b). Except for the limited review authority of the SEC, the Exchange's economic power in the securities field appears complete and absolute.

Plaintiff Thill Securities Corporation, ("Thill") is a licensed securities dealer-broker, registered with the Securities and Exchange Commission, and a member in good standing of the National Association of Securities Dealers, Inc., but is not a member of the New York Stock Exchange. It brings this action on its own behalf and on behalf of all other securities dealers and brokers similarly situated, being those who are not members of the New York Stock Exchange and who are denied access to the auction market and trading facilities of the Exchange except through one of its members. In its complaint Thill charges the Exchange with substantial anti-competitive conduct in violation of the antitrust laws of the United States. Sherman Antitrust Act, § 1 and § 2, 15 U.S.C. § 1 and § 2; and Clayton Act, § 4, 15 U.S.C. § 15. Specifically, Thill charges that the Exchange has engaged in an unlawful and unreasonable combination and conspiracy in restraint of interstate trade and commerce and has unlawfully and unreasonably monopolized the securities market in the United States by among other things adopting, subscribing and adhering to a rule which prohibits any member of the Exchange from

[1] There appears to be considerable doubt that the SEC has power to alter, amend or supplement Exchange rules dealing with any subject not specifically enumerated in section 19(b). See, Bicks, Antitrust And The New York Stock Exchange, 21 Bus. Lawy. 129, 137 n. 42 (1965).

sharing any commission earned from the purchase or sale of securities with a non-member, even though the non-member may have furnished the order;[2] and by discriminately discouraging customers and prospective customers of Thill and other non-members from doing business with non-members.

Thill alleges that as a proximate result of the unlawful and monopolistic rules and practices of the Exchange, it and other non-members of the Exchange are totally deprived of commissions or other fair compensation on transactions which they have initiated and serviced. It further alleges that the intended, necessary and actual effect of this unlawful conduct is to restrain trade by preventing any competition by and between members of the Exchange and non-member securities dealers and brokers. Thill alleges to have suffered damages in the amount of seven million dollars, for which it seeks treble damages ($21,000,000) under the antitrust laws. It also seeks a declaratory judgment that the Exchange's prohibition against sharing of commissions constitutes a violation of the antitrust laws; and an injunction prohibiting the Exchange from enforcing the prohibition. Subsequent to the filing of this action, Thill Securities Corp. went out of business.

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[2] Article XV, § 1 of the Constitution of the New York Stock Exchange provides in part:

> "Sec. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation."

The defendant Exchange does not contest the anti-competitive effects of its rule prohibiting the sharing of commissions—sometimes referred to as the antirebate rule. At oral argument its counsel admitted, as is obvious, that the conduct complained of would constitute a violation of the antitrust laws, were those statutes applicable to the activities of the Exchange in this case. Its position is that the Sherman Act does not apply to the rule of the Exchange prohibiting the sharing of commissions by members with non-members. It contends that this broad immunity is enjoyed by virtue of the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) which authorizes registered national securities exchanges to adopt rules in respect to the "fixing of reasonable rates of commission" subject to review and revision by the Securities Exchange Commission under section 19(b) of the Act, 15 U.S.C. § 78s(b). It also contends that the SEC has and is exercising exclusive review jurisdiction over such rules of the Exchange, and that its conduct is thus immune from antitrust liability. This immunity, in its view, extends beyond the "fixing of reasonable rates of commission" and includes rules relating to the "sharing" of commissions, because the prohibition against sharing of commissions with non-member broker dealers is an integral part of the "fixing of reasonable rates".

The district court essentially agreed with the position taken by the Exchange. It first found that the conduct complained of, i.e. the prohibition against the sharing of commissions, was one method of regulating commission rates, and as such was subject to review by the SEC under section 19(b); and that the SEC is exercising its section 19(b) power of supervision over the commission structure.

The district court then concluded that the "challenged Exchange practice, being within the scope and purpose of the 1934 Act, does not constitute a *per se* violation of the

antitrust laws", and that it would not be proper to inquire into the reasonableness of the Exchange's prohibition as "the SEC is currently exercising its supervisory duty over this area of Exchange self-regulation". Accordingly, the court found no genuine issue of any material fact and entered summary judgment for the Exchange. Plaintiff Thill then took an appeal to this court.

In our consideration of the issues presented in this appeal we must begin with the teachings of the Supreme Court in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). The controversy in *Silver* arose from the Exchange's unilateral direction to certain of its member firms to discontinue private wire connections with the plaintiff non-member broker-dealer. This conduct, as the Supreme Court noted in its opinion, had it occurred in a context free from other federal regulations, would constitute a *per se* violation of section one of the Sherman Act. Because the activities of the Exchange are at least in part subject to the regulation of another statutory scheme, the Securities Exchange Act of 1934, the Court was confronted with the issue as to whether the Securities Exchange Act, which created a duty of Exchange self regulation, constituted an implied repealer of the antitrust laws, thereby exempting the Exchange from liability. Upon consideration of the question, the Supreme Court soundly rejected any notion that the Exchange enjoyed blanket immunity from the enforcement of the antitrust laws simply because its activities were to a certain extent subject to the regulatory provisions of the Securities Exchange Act. On the contrary, the Court concluded that the proper approach is an *analysis* which reconciles the operation of both statutory schemes (the antitrust laws and the Securities Exchange Act) with one another rather than holding one completely ousted. In undertaking the analysis to attempt to reconcile the two statutes, courts were admonished that repeal or ouster of antitrust laws is not favored.

"The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' *United States* v. *Borden Co.*, 308 U.S. 188, 198; see *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456-457; *California* v. *Federal Power Comm'n*, 369 U.S. 482, 485. *Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis supplied, 373 U.S. at 357)

Despite these admonitions the Exchange argues, as the court below concluded, that the antitrust court's analysis ends once it is determined that the conduct complained of, here the antirebate rule, is subject to potential review by the SEC under section 19(b).

This conclusion is said to follow from the reasoning of this court in *Kaplan* v. *Lehman Brothers*, 371 F.2d 409 (1967); affirming *Kaplan* v. *Lehman Brothers*, 250 F. Supp. 562 (N.D.Ill. 1966), which concerned the Exchange's practice of fixing minimum rates of commission. That case was brought by certain shareholders in several mutual funds who charged that the practice of the Exchange in fixing minimum commission rates constituted a price fixing conspiracy in violation of section one of the Sherman Act, 15 U.S.C. § 1. In granting summary judgment for the defendants in that case, the district court stressed the fact that the plaintiffs there had attacked the rules and the prescribed rates solely on the theory that the fixing of minimum rates of commission through the collective action of the Exchange was illegal *per se* under the Sherman Act. The court then correctly

observed that as in *Silver* the conduct challenged, had it occurred in a context free from other federal regulation, would constitute a *per se* violation of section one of the Sherman Act. 373 U.S. at 347. But, because of the presence of the other statutory scheme, namely the Securities Act, the conduct was not illegal *per se* but rather called for an analysis, "which reconciled the operation of both statutory schemes." Accordingly, the Court held as a matter of law that the *per se* attack could not stand.

On appeal, this court affirmed and in a very brief (2 page) opinion expressed agreement with the district court's "holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned." 371 F.2d at 411.

The court below read *Kaplan*, both the opinions of the district court and this court, as holding that because the subject of commission rates is subject to SEC review under section 19(b) of the Securities Act, it is not subject to antitrust attack, *per se* or otherwise. Premised on this reading of *Kaplan* the district court concluded that the bar against commission sharing, being an "integral part of commission rate structure" was likewise immune from antitrust attack, *per se* or otherwise.

In reviewing the lower court's determination in this cause, we first observe that the district court correctly stated in its opinion that in *Silver*, the Supreme Court held that anti-competitive conduct by the Exchange, not subject to review by the SEC, may be reviewed by an antitrust court. It further opined, however, that the Supreme Court "intimated" that a different result, i.e. antitrust immunity, would follow where the conduct complained of was subject to SEC review. We disagree, as we find in the teachings of *Silver*, no "intimation" that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity. In our opinion this interpretation completely disregards

the firm directive in *Silver* that "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. In our view, *Silver* teaches that a reconciliation of the two statutory schemes is not foreclosed simply because the Securities Act and the review jurisdiction of the SEC may touch upon the activity challenged under the antitrust laws. As the Court in *Silver* pointed out, the New York Stock Exchange's constitution and rules are permeated with instances of regulation of member relationships with non-members, including non-member broker dealers, and that in meeting its public trust established by the Securities Exchange Act of 1934, the Exchange may properly adopt rules governing the relations of its members with non-members. That general power to adopt rules relating to the relations of its members with non-members, however, does not in and of itself place the application of such rules outside the reach of the antitrust laws. Rather it is at this point that the analysis of reconciliation really begins.

Before the investing public of the United States may be deprived of the benefit of competition through the vehicle of Exchange rules, it must be established that the Exchange's exemption from the antitrust laws is necessary to discharge its responsibilities under the Securities Exchange Act. See Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L. Rev. 675, 689 (1970); Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 West. Res. L.Rev. 131 (1964); Johnson, Application Of Antitrust Laws To The Securities Industry, 20 S.W.L.J. 536 (1966); Comments of the United States Department of Justice, filed before the Securities Exchange Commission Inquiry into New York Stock Exchange Proposals to Permit Public Ownership of Member Corporations, SEC release No. 8717. In short, its exemption must be based on a showing of true necessity. As applicable here, it must be established that

subjecting the antirebate rule to antitrust attack will frustrate the purpose of the Securities Exchange Act or make it substantially ineffective. "Otherwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly." *United States* v. *Third National Bank In Nashville*, 390 U.S. 171, 189 (1968).

In the record before us there is no evidence, save for the allegations of plaintiff, as to the effects of the anti-competitive conduct complained of; there is no evidence as to the extent to which the challenged rule is subject to actual review by the SEC; there is no evidence as to what in the regulatory scheme "performs the antitrust function"; and, most notably, there is no evidence as to why the antirebate rule must be preserved as "necessary to make the Securities Exchange Act work." In sum, this record falls woefully short of the meticulous analysis called for in *Silver*.

As to the district court's reliance on the opinion of this court in *Kaplan* v. *Lehman Brothers*, we find essential distinctions between that case and the case presently before us. The most obvious distinction is that in *Kaplan* the plaintiffs argued only that the minimum commission rate structure was illegal *per se*. This contention directly contradicts the rationale of *Silver*, which made, "plain that action taken by the Exchange and its members, pursuant to its statutory authority to makes rules, is not illegal *per se* under the Sherman Act." *Kaplan*, 250 F. Supp. at 564.[8] In this case Thill does not contend that the anti-rebate rule of the Exchange is illegal *per se*, but asks for the application of a rule of reason. See *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

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[8] See also *Baum* v. *Investors Diversified Services, Inc.*, 286 F. Supp. 914 (N.D.Ill. 1968), where a similar conclusion was reached in a *per se* attack under the Robinson-Patman Act against the pricing practices under the Investment Company Act of 1940. Aff'd, 409 F.2d 872 (7th Cir. 1969). The district court there likewise interpreted *Kaplan* as involving a *per se* attack only.

To further distinguish the cases, we recite the following comments of the trial court in *Kaplan*, relating to the anti-competitive conduct there complained of. In distinguishing *Silver* the court stated (at 565):

> "The power to deny information to non-members of an exchange is plainly susceptible to misuse as a means to destroy competition. The power to fix rates, unlike the power to exclude, is not a weapon that can be used to injure a particular competitor. The rates, once fixed, apply equally to all Exchange members and to all customers. It is not suggested by the plaintiffs here that the rates are not uniformly applied, that the schedules are discriminatory, or that the power has been used to eliminate competition beyond that elimination inherent in any system of authorized price-fixing."

The power to refuse to share commissions with certain non-members is "plainly susceptible to misuse as a means to destroy competition." It is a weapon "that can be used to injure a particular competitor." The rates once fixed, apparently do not "apply equally to all." (See pp. 15-17, infra). And, it is "suggested by plaintiffs here that the rates are not uniformly applied," are discriminatory, and that the "power has been used to eliminate competition."

While we are of the opinion that the distinctions between this case and *Kaplan* firmly support the result we reach here, we should note that the district court could have been misled by the abbreviated rationale of this court in *Kaplan*, particularly by the statement that, "the anti-trust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned." 371 F.2d at 411. This statement apparently could imply a broader immunity than is warranted by the teachings of *Silver*. See Baxter, NYSE Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L. Rev. 675,

690 (1970); Johnson, Application Of Antitrust Laws To The Securities Industry, 20 S.W.L.J. 536, 558-9 (1966); Note, Monopolies—Immunity From Antitrust Liability—Minimum Commission Rates Of Stock Exchanges, 19 Case Wes. Res. L. Rev. 167 (1967). It was such an interpretation that obviously impelled the sharp criticism of this court's opinion by Chief Justice Warren when he dissented from the Supreme Court's denial of Certiorari in *Kaplan*. The Chief Justice discussed the importance of the issues presented in the case and complained that the substantial allegations of the plaintiffs were never afforded the hearing called for in *Silver*.

> "The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that 'the self-regulatory function of the exchange has been exercised by virtue of § 19(b),' 371 F.2d, at 411. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver*.
>
> "The importance of the New York Stock Exchange in the functioning and livelihood of this Nation can not be gainsaid. Ever-increasing millions of persons and billions of dollars are affected by the Exchange's practices. Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below. In my judgment, the claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, but also as to the fulfillment of the goal of investor protection embodied in the securities laws." 389 U.S. at 957-8.

Even the "broad language" of *Kaplan*, however, does not go so far as the Exchange now would urge. It argues that potential review by the SEC vests that agency with exclusive jurisdiction over the subject to the exclusion of the antitrust court. The lower court, at least in part, adopted this theory finding that it would not "be in the interest of making the 1934 Act work" to undertake "an inquiry into the reasonableness of the Exchange's prohibition or to apply the antitrust laws to the challenged practice." In so finding the court stressed that the, "SEC is currently exercising its supervisory duty over this area of Exchange self regulation, and I am of the opinion that such supervision constitutes more than adequate review and control of the Exchange practices." This conclusion, relating to the adequacy of the SEC's review, was apparently based on the fact that the SEC has from time to time reviewed and approved the rate structure of the Exchange and more particularly on May 28, 1968 the SEC announced the commencement of an investigation and public hearing to consider changes in the rules, policies and practices of all exchanges respecting commission rate structure. The announcement published by the SEC listed "Economic Access to the Exchange Market by Non-Member Broker Dealers" as one of the matters to be inquired into. These hearings are still in progress. From these limited facts the court concluded, "It thus appears clear that the SEC has and is current exercising its § 19(b) duty of supervision over the Exchanges' commission structure".

As we observed above, there is no evidence in the record that the SEC is exercising actual and adequate review jurisdiction under the Act. Furthermore, even the fact that the SEC may be exercising its proper supervisory power over the rules of the Exchange does not in and of itself cloak the Exchange with antitrust immunity for its conduct relating to those rules. Of course it is not disputed that in exercising its review power under section 19(b), the

SEC, like other regulatory agencies, may weigh and consider antitrust factors. *See The Rules of The New York Stock Exchange*, 10 S.E.C. 270 (1941).

But, that fact does not vest the Commission with primary responsibility for the enforcement of competition as mandated by Congress in the antitrust laws. *United States* v. *First National Bank and Trust Co. of Lexington*, 376 U.S. 665 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962).[4] These cases, particularly the *Philadelphia National Bank* case, squarely reject the Exchange's contention that the court's inquiry must end once it is established that its rules were adopted pursuant to its duty of self regulation under the 1934 Act and are subject to SEC review.

In *Philadelphia National Bank*, a merger of two large banks in the Philadelphia area was approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960. Under the Act the Comptroller is required to consider the effect on competition in passing on merger applications. And, before granting approval under the Bank Merger Act, the Comptroller received reports from the Attorney General and from other gov-

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[4] These and numerous other cases referred to in the Court's opinion in *United States* v. *Philadelphia National Bank*, hold that repeal of antitrust laws in regulated industries is to be implied only where necessary to permit the agency to fulfill its statutory function. Repeal has been found in only a few cases where the regulatory body has been granted specific broad and detailed authority over rates, service offerings and market areas and where it has been granted express antitrust exemptions for agency approved transactions. Even under these circumstances the exemptions have been limited. See, for examples of the exemptions and their limits, *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), and 49 U.S.C. §§5 par. (11), 5(b) (railroads and trucking); *Carnation Company* v. *Pacific Westbound Conference*, 383 U.S. 213, modified 383 U.S. 932 (1966), and 46 U.S.C. §§813(a), 814 (shipping); *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963) and 49 U.S.C. § 1384 (airlines).

ernment agencies as to the effect of the merger on competition. Despite the Comptroller's statutory approval, the Justice Department attacked the merger as a violation of section 7 of the Clayton Act, 15 U.S.C. § 25. In resisting the attack, the banks argued that because the Bank Merger Act directed the Comptroller to consider competitive factors before approving mergers, any merger so approved was immunized from challenge under the antitrust laws. In rejecting this contention, the Supreme Court observed that, "No express immunity is conferred by the Act", and that, "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored", 374 U.S. at 350, citing a legion of cases including *Silver* v. *New York Stock Exchange*.

In our view the facts here are much stronger in favor of application of the antitrust laws than were those in the *Philadelphia Bank* case. In reviewing the rules of the Exchange the SEC is not required to consider their effect upon competition. On the contrary, its history in reviewing rules adopted by the Exchange indicates a reluctance to do so. It has been suggested that the SEC has never, "forcibly altered an Exchange's commission rate structure, and there is little to indicate that it has even thoroughly investigated proposed rate revisions". Note: Monopolies—Immunity From Antitrust Liability—Minimum Commission Rates Of Stock Exchanges, 19 Case Wes. Res. L. Rev. 167, 173 (1967). In the *Kaplan* case discussed in detail above, it was alleged without contradiction that the underlying data used by the SEC in reviewing each of the five rate increases since 1934 have been essentially those supplied by the Exchange, and have been very limited in scope and content. See dissenting opinion of Chief Justice Warren, 389 U.S. at 956.

Legal writers have also been critical of the SEC's passive supervision of the Exchange. One has described the SEC as a "tame watchdog", as a result of which "self-

regulation has come to mean, at least to the industry and particularly to the New York Stock Exchange, that the SEC will observe a rather passive role, leaving the industry to govern itself in its own wisdom." Jennings, Self-Regulation in the Securities Industry; The Role of the Securities and Exchange Commission, 29 Law and Contemp. Prob. 663, 664-5 (1964). See also, Note: Antitrust And The Stock Exchange, Minimum Commission or Free Competition, 18 Stan. L. Rev. 213 (1965).

Parenthetically, and by way of expressing our agreement with the Supreme Court's policy of strictly limiting all antitrust exemptions in deference to regulatory bodies, we also note that the history of United States regulatory agencies in general seems usually to record an ever growing absence of the spirit required for vigorous enforcement of the antitrust laws. Rather, it seems to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate.

Perhaps Congress had this possibility in mind when it strictly limited the powers of the regulatory agencies to enforce the antitrust laws. Insofar as the securities industry is concerned, it is clear that Congress did not intend to exempt that industry from antitrust liability when it passed the Securities Exchange Act. *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953). Their purpose in passing the Act and the primary responsibility of the SEC thereunder is to protect investors. It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. Congress and our Supreme Court have directed the courts to employ this expertise unless the court in a given case concludes that its employment will frustrate the goals of the regulatory scheme. As we have indicated herein, no such conclusion is justified in this case.

at least not at this stage of the proceedings—before any evidence has been offered to support the proposition that judicial interference with the Exchange's antirebate rules will frustrate the goals proposed by the Securities Exchange Act.

In remanding this cause to the district court where this inquiry may be pursued, we think it appropriate to note certain observations that have occurred to us in reviewing the record and in considering the arguments of both parties in this complex case.

Most important, before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because it is necessary for the operation of the Securities Act.

We further note from our review of the transcript of proceedings below in certain portions not included in the Appendix (pages 3-5, 22-23, 30-33, of proceedings of November 15, 1968) that the district court inquired at the commencement of defendant's argument in support of its motion for summary judgment, as to whether factual evidence would be necessary to decide this case and if so, what type of evidence.

Counsel for plaintiff suggested to the court that expert testimony would be required to establish, if possible, that the conduct complained of was necessary to make the Securities Act work. We agree and offer the further suggestion that it seems particularly appropriate in a case of this nature for the court to invite the participation, by way of expert testimony and legal argument, of the government agencies so vitally interested in the issues before the court —the SEC and the Department of Justice.

We make the further observation, without prejudging the issue, that it is difficult to conceive how the Exchange can on remand argue that the antirebate rule is "necessary

to make the Act work" when its members have gone to imaginative extremes to circumvent the rule when it serves their private economic purposes to do so. It appears from all we can read on the subject that the rule is honored much more in its breach than in its observance, as through various devices, member firms routinely share commissions or the equivalent with favored non-member brokers. One writer, after first discussing the business considerations that require member and non-member cooperation, explains the system as follows:

> "To accommodating these obvious member and non-member interests, the principal hurdle is the Exchange ban on 'any rebate, return, discount or allowance' off the NYSE rate schedule.
>
> "It is to get around this antirebate hurdle that a variety of reciprocal business and special service arrangements have emerged. Highlighting typical reciprocity deals, a member may place 'business on a regional exchange with a nonmember who is a member of that exchange even though . . . the member is also a member of the regional exchange . . . and could have placed the business there directly or . . . the security is traded on the NYSE as well as the regional exchange' so that the member could have just as well done the business at home. And where an over-the-counter dealer is to be the recipient of member favor, the member may deal through the nonmember even though the member's trading department could itself have effected the transaction. As the ratios for such *quid pro quo's* become formalized, oft' times in the area of $1 in commission to the nonmember for every $2 or $3 he produces for a member, these devices become little more than arrangements for commission splits—condoned so long as they are based simply on the member's hope that he can secure return business'. Much this same goal of recompense for past or lure

> for future nonmember favor can also be served by the member's performance, on advantageous terms, of a gamut of 'special services: installation and maintenance of wire services, clearance of non-Exchange transactions, office space, special research, and promotional materials and displays.' Here, again, under Exchange construction of its rules, some 'nominal charge' for such 'services' can convert a 'prohibited rebate into a permissible arrangement.'" Bicks, Antitrust and the New York Stock Exchange, 21 Bus. Lawy. 129, 146-147 (1965).

See also, Jennings, Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission, 29 Law and Contemp. Prob. 663, 688-9 (1964); Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 West. Res. L. Rev. 131, 148 (1964); Comment, The Minimum Commission System And The New York Stock Exchange, 38 Ford. L. Rev. 84, 85-6 (1969)' Note, The Application of Antitrust Laws To The Securities Industry, 10 Wm. & Mary L. Rev. 136, 160-2 (1968).

Concern over these practices has also been expressed by the President of the Exchange (Letter of President Robert W. Haack to Members of the Exchange, January 2, 1968), and by the SEC (Director Irving M. Pollack to all national exchanges, July 18, 1966, and Report of the Special Study of the Securities Markets, 1963).

It is also important to note that the other national stock exchanges manage to make the Act work without need of the antirebate rule.

Finally, and apart from the antirebate rule, the complaint below raised additional issues which were not considered by the district court when it granted defendant's motion for summary judgment. Specificially, Thill alleges that the Exchange has engaged in unfair advertising practices aimed at undermining public confidence in the compe-

tence and reliability of non-member broker-dealers. It also alleges that members, through the benefit of the antirebate rule, pirate customers of non-members by assuring them that they can operate less costly than non-members because the non-member must tack on some commission for his services. Such allegations of predatory practices in such a vital industry clearly require more than summary dismissal and should be fully considered on remand.

Accordingly, the cause is reversed and remanded to the district court for full proceedings consistent with the conclusions herein.

SWYGERT, *Chief Judge*, concurring. In the main I concur in Judge Campbell's excellent treatment of the difficult problems of conflict between antitrust and securities laws presented in this case.

In my view the appeal presents only one question: whether Congress, by the enactment of the Securities Exchange Act of 1934, intended to exempt rules promulgated by The New York Stock Exchange from the general competitive principles contained in the antitrust laws and to place exclusive jurisdiction over those rules in the Securities Exchange Commission. For the reasons set out below, I agree with Judge Campbell that *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), although not directly in point, provides sufficient guidance to hold that the district court erred in ruling that Article XV, § 1 of The New York Stock Exchange Constitution (the antirebate rule) is exempt from attack under the antitrust laws.

Two additional questions exist in this case which are not before us in this appeal: (1) whether the doctrine of primary jurisdiction requires that the anticompetitive aspects of an exchange rule be considered in the first instance by the SEC; and (2) whether the antirebate rule violates § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. Both questions are exceedingly difficult and require careful

consideration by the district court. Although we may indicate relevant lines of inquiry on remand, I believe our function as an appellate court is best fulfilled by eschewing consideration of the merits of these questions.

I.

Defendant argues that the antirebate rule is exempt from antitrust attack if it is within the scope of the exchange's duty of self-regulation and subject to the SEC's power of review and revision under section 19(b) of the 1934 Act.

This position is not compelled by *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). In that case plaintiff, a nonmember broker, alleged that defendant unlawfully deprived him of private telephone wire connections to municipal bond and corporate securities departments of member firms by means of an *ex parte* order issued by The New York Stock Exchange to certain of its members. Although the Exchange's power to terminate wire connections with nonmember brokers was implicit in its constitution and rules, *Silver* v. *New York Stock Exchange*, *supra* at 354-55, nn. 9 & 11, the Supreme Court chose to treat plaintiff's complaint as challenging a particular instance of exchange action. When so viewed the Court ruled that defendant had violated the Sherman Act. Its holding may be summarized as follows. (1) the action of the Exchange would be a per se violation of the Sherman Act unless immunized by the Securities Exchange Act of 1934, *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Fashion Originator's Guild* v. *FTC*, 312 U.S. 457 (1941). (2) The rules applied by the Exchange were "germane to performance of the duty implied by § 6(b) and § 6(d) [of the 1934 Act] to have rules governing members' transactions and relationships with nonmembers." *Silver* v. *New York Stock Exchange*, *supra* at 356. As a result the action of the defendant was not a per se violation. (3)

Nevertheless, repeal of the antitrust laws by the enactment of the 1934 Act "is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.* at 357. (4) The aims of the 1934 Act offer no justification for "self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked . . . and allowing him to reply in explanation of his position." *Id.* at 361. For this reason the Court held that the conduct of the defendant violated the Sherman Act.

Defendant argues, however, that our decision in *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N.D.Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967), by resolving a question expressly reserved in *Silver*, adopts the rule which it advances. Thus defendant emphasizes that the Court in *Silver* noted that, "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Silver* v. *New York Stock Exchange*, *supra* at 360. It argues that the *Kaplan* case held the exchange rule governing minimum commission rates exempt from the Sherman Act on the ground that section 19(b) of the 1934 Act provides agency review of exchange self-regulation through authority of the SEC "to alter or supplement the rules of . . . [an exchange] in respect of such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing and other charges."

I agree with Judge Campbell that defendant reads the *Kaplan* case too broadly and that it stands only for the limited proposition that the Exchange's minimum commission rate rule was not a per se violation of the Sherman Act. I further concur with his view that the Supreme Court would apply the holding of *Silver* to exchange rules as well as to a specific application of those rules and that

SEC supervision under section 19(b) is insufficient to place exclusive jurisdiction over exchange rules in the SEC. In reaching this conclusion I would reject defendant's argument that the absence of discussion of the anticompetitive aspects of exchange rules in the legislative history of the 1934 Act constitutes implied repeal of the antitrust laws for rules within the domain of exchange self-regulation. This argument seems especially weak in light of the Maloney Act, 15 U.S.C. §§ 78 a-hh, enacted in 1938, which expressly provides for consideration by the SEC of anticompetitive practices in analogous regulation of registered securities associations. Thus the availability of SEC review of exchange self-regulation under section 19(b) is, in my view, irrelevant to the scope of exchange exemption from the antitrust laws. However, for reasons discussed below, I believe the existence of this review *is* relevant to a determination of whether the SEC possesses primary jurisdiction over exchange rules.

For these reasons I agree that this case must be remanded for fresh consideration of whether the antirebate rule violates the Sherman Act. It is clear that this rule would constitute a per se violation of that law unless immunized by the 1934 Act. Further, the district court correctly held that the antirebate rule is within the Exchange's duty of self-regulation. Thus, the court on remand will be faced with only one question: whether the antirebate rule is necessary to make the 1934 Act work. As to the resolution of this issue I, of course, express no views.

II.

I differ with Judge Campbell's excellent opinion only insofar as it can be interpreted as deciding that the SEC does not possess primary jurisdiction to consider the anticompetitive aspects of exchange rules. I believe this question lurks in the background of this case and lies at the heart of proper resolution of conflicting antitrust and secu-

rities law considerations present in this appeal. *See generally* Baxter, NYSE FIXED COMMISSION RATES: A PRIVATE CARTEL GOES PUBLIC, 22 Stan. L. Rev. 675, 683-89 (1970). The history of the proceedings below indicates that the issue of primary jurisdiction was never considered. Thus, defendant moved for summary judgment on the sole ground that exchange rules were within the exclusive jurisdiction of the SEC and exempt from antitrust attack. I believe the district court decided defendant's motion on this basis even though the court did refer to presently pending proceedings before the SEC to support its holding on exclusive jurisdiction. For the reasons that follow I am convinced that the issue of primary jurisdiction is not resolved by prior cases. Therefore, on remand the district court may consider this issue prior to a decision on the merits of plaintiff's complaint.

The issue of primary jurisdiction was not reached in *Silver* v. *New York Stock Exchange, supra,* since the court interpreted plaintiff's complaint as challenging a particular application of an exchange rule, a matter over which the SEC was without jurisdiction. There the Court stated: "[The 1934 Act] does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. . . . This aspect of the Statute . . . obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into court. . . ." *Id.* at 357-58. In footnote 12 the Court indicated that a different result might obtain if exchange self-regulation were subject to SEC jurisdiction and ultimate judicial review. As a result the existence of primary jurisdiction by the SEC to consider the anticompetitive aspects of exchange rules is a question of first impression in this case.

Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. *Compare, Pan American World Airlines, Inc.* v. *United*

States, 371 U.S. 296 (1963); California v. FPC, 369 U.S. 482 (1962). Such cases demonstrate that the existence of primary jurisdiction depends upon consideration of numerous factors concerning agency jurisdiction and expertise. Therefore, in resolving this issue the following questions, among others, might be considered on remand: (1) whether and to what extent the SEC is empowered to consider antitrust laws and policy in fulfilling its duty of review of exchange self-regulation; (2) whether an aggrieved party may initiate SEC review of exchange rules under the provisions of the Securities Exchange Act or the Administrative Procedure Act; (3) whether and to what extent SEC expertise would be useful in resolving, in the first instance, the question of whether a given rule is necessary to make the Securities Act work; and (4) whether the anticompetitive aims of the Sherman Act can be achieved without subjecting the exchanges to treble damage suits which necessarily result if the doctrine of primary jurisdiction is unavailable to the defendant in this case. These issues have not been briefed in this appeal and I decline to attempt their resolution at this time.

PAUL, *Circuit Judge*. Concurring in part and dissenting in part.

While I concur in the majority's determination to remand this cause for further proceedings, I find it necessary with respect to the scholarly and analytical opinion of Judge Campbell to dissent with regard to the scope of the further proceedings ordered.

In my opinion, the "fixing or reasonable rates of commission . . . and other charges" as provided for by § 19 (b)(9) of the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b)(9)) necessarily includes as an ancillary power the prohibition of rebates. The practice of rebates in the field

of securities undoubtedly might well involve antitrust considerations if the jurisdiction in the area had not been placed by Congress in the Securities and Exchange Commission. But, in my opinion, it has been so placed.

A scheme or pattern of fixing commissions would seem to me to involve as an integral part thereof control of the matter of possible rebates. As of the present time, that control has been exercised by a prohibition of any rebates.

I would therefore eliminate from further proceedings in this case the matter of the Exchange rule *per se*, being in my opinion controlled by *Kaplan* v. *Lehman Brothers*, 250 F. Supp. 362 (N.D. Ill. 1966), 371 F.2d 469 (7th Cir. 1967), cert. denied, 389 U.S. 954 (1967).

My opinion in this respect is buttressed by the fact that the very matter in issue is now under consideration by the SEC which on May 28, 1968 announced investigation and public hearings on rate structure matters including economic access to the Exchange market by non-member broker-dealers.

It would seem inappropriate, in my opinion, for this court, or the court below, to attempt to determine the reasonableness of the Exchange prohibition against commission sharing, which the SEC has the power to modify if not consistent with the purposes of the 1934 Act.

The matter of the place of antitrust regulation where a regulatory agency is involved has frequently been before the courts. See the comments of Judge Leventhal in concurring, *Cities of Statesville* v. *AEC*, ... F.2d .....(D.C. Cir. 1969).

To paraphrase the language of Judge Leventhal, it is a fair synthesis of these cases that a statute providing for licensing or other regulation is presumed to permit con-

sideration of antitrust principles, with the harmonizing of diverse and even competing principles, unless a contrary intent appears expressly or by necessary implication. No intent to disregard the antitrust principles appears in the Securities Exchange Act of 1934.

However, the plaintiff here as contrasted to *Kaplan* does not rely solely on the claimed illegality of the anti-rebate rule but further alleges in effect that if the rule were valid the practices engaged in are violative of anti-trust principles. Particular reference was made to various sophisticated devices whereby favored non-members had the practical effect of rebates. This matter as well as those referred to in the next to last paragraph of the majority opinion created genuine issues of fact which should have precluded a summary judgment.

I also must respectfully question the majority's observation regarding lack of diligence on the part of regulatory agencies enforcing antitrust laws and succumbing to the domination of the industry which they were created to regulate. If it be a fact that there is an apparent lack of diligence this may consciously have been a result reached in balancing diverse public interests. However that may be, I do not have any basis in fact on which to concur in the observation.

It is also to be noted that the parties agree that the SEC may not award damages. It has been held in an analogous situation that under these circumstances even though injunctive relief might be denied, damages could be pursued in the court proceedings. *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 632, 633 (D.C. Cir. 1951).

For the reasons hereinbefore set out I would reverse and remand but would limit the issues as hereinbefore indicated although in so doing I do not purport, as I am

sure the majority did not purport, to suggest what the district judge's determination could be after hearing the evidence which will be adduced.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, November 18, 1970.

Before:

Hon. Luther M. Swygert, *Chief Judge*
Hon. Roger J. Kiley, *Circuit Judge*
Hon. Thomas E. Fairchild, *Circuit Judge*
Hon. Otto Kerner, *Circuit Judge*
Hon. Walter F. Pell, Jr., *Circuit Judge*

Thill Securities Corporation, etc., *Plaintiff-Appellant*, vs. New York Stock Exchange, *Defendant-Appellee*.	Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 18036

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court having voted to deny a rehearing and rehearing en banc,

It Is Ordered that the petition for rehearing and the petition for rehearing en banc be, and the same are hereby denied.

Judge Pell voted to grant the petition for rehearing and the petition for rehearing en banc.

Judge Walter J. Cummings and Judge John Paul Stevens did not participate in the consideration of the petition.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THILL SECURITIES CORPORATION, on its own behalf, and on behalf of all securities brokers and dealers in the United States similarly situated,

Plaintiff,

vs.

THE NEW YORK STOCK EXCHANGE,

Defendant.

No. 62-C-364

OPINION AND ORDER

The plaintiff in this action, Thill Securities Corporation (hereinafter "Thill"), is a broker dealer in securities but is not a member of the defendant, The New Stock Exchange (hereinafter the "Exchange"). Plaintiff purports to bring this claim as a class action on behalf of itself and those similarly situated. The amended complaint charges, in essence, that the Exchange and its members have engaged in a combination and conspiracy in restraint of the trade in securities and have monopolized such trade in violation of §§ 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2) and § 4 of the Clayton Act (15 U.S.C. § 15) (hereinafter the "antitrust laws") by reason of provisions of the Exchange's Constitution prohibiting its members from sharing commissions on the purchase or sale of securities listed on the Exchange with non-member brokers and dealers.[1]

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[1] Article XV, § 1 provides:

"Sec. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and those commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from any rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No honus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except

Jurisdiction of this court is based on the aforementioned provisions of the federal antitrust laws.

Thill seeks (1) a declaratory judgment determining that the Exchange's prohibition on commission sharing constitutes a violation of the antitrust laws; (2) an injunction requiring the Exchange to refrain from enforcing provisions of its Constitution and Rules prohibiting Exchange members from sharing commissions with non-members; and (3) recovery of $21,000,000 in treble damages plus counsel fees and expenses.

The matter is presently before this court on the Exchange's motion to dismiss the action pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure. The Exchange seeks judgment in its favor dismissing the action on the grounds that (1) the complaint fails to state a claim upon which relief may be granted, (2) there is no genuine issue as to any material fact, and (3) as a matter of law it is entitled to a judgment in its favor dismissing the action.

In support of its motion the Exchange contends that:

(a) The Sherman Act is not applicable to those provisions of the Constitution and Rules of the Exchange which establish minimum commission rates to be charged by its members and which prohibit the sharing of commissions

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as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation.

Commissions on other exchanges

"Notwithstanding the provisions of this Article, any member of the Exchange or member firm or member corporation holding a membership or associate membership in another exchange located in the United States, or holding a membership or associate membership in a Canadian exchange, or registered with a Canadian exchange as being entitled to a return of commission from members of said exchange, may in respect of transactions made on such other exchange charge the rates of commission prescribed by such other exchange."

with non-members by virtue of § 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq.*) (hereinafter the "1934 Act"). [This section authorizes the adoption by a national securities exchange of rules prescribing rates of commission subject to review and revision by the Securities and Exchange Commission (hereinafter "SEC")] and

(b) Under the provisions of § 19(b) of the 1934 Act the SEC has exclusive jurisdiction (which it is presently exercising) to review the Constitution and Rules of the Exchange respecting the structure and level of commissions, including the prohibition against sharing of commissions with non-members.

In short, the basic contentions of the Exchange on this motion are that the fixing of reasonable rates of commission is part of the Exchange's duty of self-regulation imposed by § 19(b) of the 1934 Act; that such rate-fixing is subject to review and revision by the SEC and is therefore immune from antitrust liability under the holdings in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) and *Kaplan* v. *Lehman Brothers*, 250 F.Supp. 562 (N.D. Ill. 1966); *aff'd.*, 371 F.2d 469 (7th Cir), *cert. denied*, 389 U.S. 954 (1967); and that the prohibition against sharing commissions with non-member dealer-brokers is an integral and necessary part of the "fixing of reasonable rates of commission" *and should therefore* have antitrust immunity to the same extent as the fixing of the commission rates themselves.

The basic contentions of Thill, in opposition to the motion, are that the *Silver* and *Kaplan* cases require that the motion be denied; that those cases do not hold the Exchange immune from antitrust liability but only that anticompetitive acts of the Exchange are not illegal *per se* (as opposed to being in violation of the Rule of Reason) if within the scope and purposes of the 1934 Act; that the anticompetitive rule complained of is not within the scope and purposes

of the 1934 Act and, even if it were, it is an unreasonable monopolization and restraint of interstate trade and commerce; and that there are issues of fact that require denial of the motion.

I have studied the briefs and affidavits submitted by the parties and it is my opinion that there is no genuine issue of material fact in the present litigation. The sole question for this court's determination (whether the Sherman Act is applicable to the provisions of the Exchange Constitution prohibiting the sharing of commissions with non-members) is a question of law which may appropriately be decided on the Exchange's motion for summary judgment.

This controversy stems from the apparent conflict between the broad program of federal regulation of trading in securities established by the 1934 Act and the "regulatory scheme" of the federal antitrust laws. It is clear that the 1934 Act did not expressly exempt the subject of securities trading from the operation of the antitrust laws, but in *Silver* v. *United States*, *supra*, the Supreme Court was asked to decide whether the 1934 Act, although containing no express antitrust exemption, had created a duty of Exchange self-regulation and government supervision so pervasive as to constitute an implied repeal of the antitrust laws.

In *Silver*, the Exchange directed certain of its member firms to discontinue private wire connections with the plaintiff non-member over-the-counter broker-dealer, without giving any reason or giving the non-member notice or an opportunity to be heard. The plaintiff claimed that such Exchange action constituted a *per se* violation of §1 of the Sherman Act.

Rejecting the contention that the program of broad federal regulation established by the 1934 Act constitutes an across-the-board repeal of the antitrust laws, the Court

adopted a policy of reconciling both statutory schemes with one another rather than holding one completely ousted by the other. As a guideline in such reconciliation, the Court stated that repeal of the antitrust laws should be implied "only if necessary to make the Securities and Exchange Act work and even then only to the minimum extent necessary." *Silver*, *supra*, at 357. In this respect, the Court noted that although the Exchange has been given the general power to adopt rules governing its members' relations with non-members as well as the investing public, it does not necessarily follow that particular rules are therefore outside the purview of the antitrust laws.

In *Silver*, however, the Court never found it necessary to decide whether an implied repeal of the antitrust laws was required under the particular circumstances to make the 1934 Act work. The particular Exchange rule involved was not subject to SEC supervision, and therefore, no necessity to imply a repeal ever arose because no problem of conflict or contemporaneous coverage between antitrust regulation and SEC supervision existed. In short, the Court held that when self-regulatory conduct by an exchange is not subject to SEC review under the 1934 Act, there is no policy of securities control which would require exclusion of the application of the antitrust laws or immunization of the Exchange conduct, and therefore such conduct may be reviewed by an antitrust court in order to determine whether the challenged Exchange conduct is reasonably calculated to further the policies reflected in the 1934 Act or is in violation of the antitrust laws. The Court further intimated that a different result might be reached where the particular Exchange conduct was subject to SEC regulation, but the Court specifically declined to reach this issue. *Silver*, *supra*, at 358 n. 12.

This problem of conflict between antitrust regulation and SEC supervision did arise, however, in *Kaplan v. Lehman Brothers*, *supra*, which, as indicated before, was affirmed

by the 7th Circuit and certiorari was denied by the U. S. Supreme Court. In *Kaplan*, the court was faced with the legality of the Exchange's practice of fixing minimum commission rates to be charged by Exchange members for the purchase or sale of securities listed on the Exchange. The district court found that the 1934 Act empowered the Exchange to establish minimum commission rates to be charged by Exchange members, and that such rates were subject to SEC review under § 19(b)(9) of the 1934 Act. Based on these findings, the court concluded that the holding of *Silver* completely barred the antitrust action.

In so holding, the district court reasoned that (1) because the fixing of minimum commission rates was done pursuant to authority conferred by the 1934 Act, such fixing did not constitute a *per se* violation of the antitrust laws; and (2) since the SEC exercised a general and continuing supervisory power over the fixing of minimum commission rates, there was no need to resort to the antitrust laws for a remedy. In the latter regard, the district court refused the plaintiff's request that it embark on an inquiry into the reasonableness of the minimum commission rates, holding that this was a question exclusively within the jurisdiction of the SEC which was uniquely endowed with the necessary expertise to determine such questions.

Affirming the district court's decision, the Court of Appeals for the Seventh Circuit stated at 411:

> "We do not construe the Sherman Act and the Exchange Act as showing a congressional intention to permit the maintenance of an antitrust prosecution of the exchange or its members to be based upon its action relating to rates of commission to be charged by its members. Obviously the fixing of minimum commissions is *one method* of regulating commission rates." (emphasis added)

It is my opinion that the Exchange's prohibition against the sharing of commissions with non-members is also "one method of regulating commission rates," and therefore, like the Exchange practice of establishing minimum commissions, is immune from the antitrust laws. As a provision relating to the fixing of reasonable commissions it comes within the scope of the Exchange's self-regulatory authority embodied in § 19(b) of the 1934 Act and as such does not constitute a *per se* violation of the antitrust laws. *Silver, supra.* There is nothing in the 1934 Act which specifies precisely what rules the Exchange must adopt with respect to the fixing of commissions; nor is there any requirement that its rules must conform to those of other exchanges. The Exchange is simply empowered to promulgate rules relating to the fixing of commissions which in turn are subject to SEC supervision so as to insure that the rules established are in furtherance of the purposes of the 1934 Act.

Thill urges, however, that even if this court finds the prohibition against sharing to be within the Exchange's authority under the 1934 Act and therefore not a *per se* violation of the antitrust laws, this court must still deny the Exchange's motion and proceed to determine whether the challenged prohibition is an unreasonable monopolization and restraint of trade in violation of the Rule of Reason first enunciated in *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

Article XV, § 1 of the Exchange's Constitution[2] prescribes minimum commission rates and prohibits members from sharing commissions with non-members. This prohibition was a part of the original Exchange Constitution which was approved by the SEC on September 28, 1934. Since that time the provisions of the Constitution prescribing minimum rates of commission have been changed

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[2] See Text of Constitutional provision set forth in note 1, *supra*.

by the Exchange on five different occasions: in 1938, 1942, 1947, 1953 and 1958. No change was made on any of these occasions in the companion provisions prohibiting returns, rebates, discounts or allowances to non-members. In each instance the SEC studied and reviewed the changes. In some instances changes were permitted to stand without modification. In 1942 and 1958, however, the SEC requested modifications which were later adopted by the Exchange.

Although at no time has the SEC requested any change in the Constitutional provision prohibiting the sharing of commissions with non-members, on May 28, 1968, the SEC announced that it had issued an order for the institution of an investigation and a public hearing to consider whether any changes should be made in the rules, policies, practices and procedures of registered national securities exchanges respecting commission rate structure. In its release the SEC stated that the hearing was intended to assist it in the discharge of its responsibilities under § 19(b) of the 1934 Act. In its order directing the public investigation, the SEC listed "economic access to exchange markets by non-member broker-dealers" as one of the matters relating to exchange commission rate structure to be inquired into. The public hearings ordered by the SEC, which began before a hearing officer on July 1, 1968, are currently in progress. It thus appears clear that the SEC has and is currently exercising its § 19(b) duty of supervision over the Exchange's commission structure.

Having found that (1) the Exchange's prohibition against commission sharing is "one method of regulating commission rates" and therefore within the scope of the Exchange's self-regulatory authority suggested in § 19(b)(9) of the 1934 Act, and (2) the SEC is currently exercising its § 19(b) power of supervision over the Exchange's commission structure in general and the Exchange's policy of

prohibiting the sharing of commissions in particular, it is my conclusion that the doctrine of reconciliation announced in *Silver* and as applied by the district court and the Court of Appeals in *Kaplan* dictates that the Exchange's motion for summary judgment be granted.

The challenged Exchange practice, being within the scope and purposes of the 1934 Act does not constitute a *per se* violation of the antitrust laws. Nor do I feel that it would be in the interest of making the 1934 Act work for this court to undertake an inquiry into the reasonableness of the Exchange's prohibition or to apply the antitrust laws to the challenged practice. The SEC is currently exercising its supervisory duty over this area of Exchange self-regulation, and I am of the opinion that such supervision constitutes more than adequate review and control of the Exchange's practices.

For the foregoing reasons,

It is hereby ordered that the defendant's motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure should be and it hereby is granted. The Clerk of the Court is therefore directed to enter judgment in favor of the defendant, The New York Stock Exchange, consistent with this opinion.

Dated at Milwaukee, Wisconsin, this 21st day of August, 1969.

JOHN W. REYNOLDS
U.S. District Judge

LIST OF ANTITRUST CASES FILED AGAINST THE EXCHANGE SINCE APRIL 1963

Date Filed	Style of Case	Court	Damages Prayed For
	Max L. Cowen v. New York Stock Exchange and Mohawk Valley Investing Company	Northern District of New York	$750,000
10/24/63	Thill Securities Corp. v. New York Stock Exchange	Eastern District of Wisconsin	$21 million
4/ 1/64	Klehanow v. Funston *et al.*	Southern District of New York	$2.1 million
3/25/65	Kaplan v. Lehman Brothers *et al.*	Northern District of Illinois	$423,000/day
11/27/67	Williston & Beane v. Haack *et al.*	Southern District of New York	$9 million
7/23/70	Jacobis v. Bache & Co. *et al.*	Southern District of New York	Unspecified
10/ 5/70	Reinisch v. New York Stock Exchange	Southern District of New York	$3 billion
11/27/70	Kinzler v. New York Stock Exchange *et al*	Southern District of New York	Unspecified